IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2180 OF 2006

Shyam Sundar Saraogi Petitioner
vs.
Municipal Corporation of Gr.Bombay & ors. Respondents

Mr.K.M.Nakhwa with Mr.V.B.Dhawan for the petitioner.

Mrs.P.A.Purandare for respondents 1 to 5.

Mr.Pradeep Jadhav, AGP for respondents 6 to 8.

CORAM : F.I.REBELLO &
ANOOP V. MOHTA,JJ.

DATED : 26th September, 2006

P.C.

Rule. Heard forthwith.

2. Petitioner is the owner of plot bearing CTS No.142 admeasuring 391.5 sq.mts. situated at village Juhu. The petitioner applied to respondent no.1 for development of the property. I.O.D. was granted on 3.9.1996 and C.C. was granted on 2.9.1999 for ground plus three floors. In so far as the ground plus three upper floors are concerned, there is no dispute.

3. On 24.4.2000 petitioner submitted proposal plans for utilisation of T.D.R. for construction of 4th and 5th floors. According to the petitioner, on submission of plans they have to be approved by respondent no.1 within 60 days which is the statutory period as required under

Section 45(5) of the Maharashtra Regional Town Planning Act, 1966 (hereinafter referred to as "the MRTP Act"). As the petitioner was not communicated with any approval, rejection or conditional approval, it amounted to deemed approval and sanction. It is also sated that in so far as the construction of 4th and 5th floors the deficiency in open space was approved by Chief Engineer, D.P. on 28.7.2000. This was approved by the Director of Engineering Services on 5.8.2000 and the approval of the Deputy Chief Engineer was granted on 10.8.2000. This it is submitted is indicative of the fact that the amended plans for the construction of the 4th and 5th floors were in accordance with the MRTP Act, the DC Regulations and the law relating to CRZ as on 24.6.2000 which is the date of deemed permission. The construction of the 4th and 5th floor was commenced on the last week of June 2000 and the same was completed by December, 2000. A stop work notice had been issued to the petitioner on 23.8.2000. In the list of dates given by the petitioner, it is set out that on 4.8.2000 the Urban Development Department of the State of Maharashtra issued notification on the subject of utilisation of TDR in Coastal Zone Management Plan. On 10.7.2002 the respondent no.4 issued a notice to the petitioner under Section 53(1) of the MRTP Act. The petitioner replied to the same on 19.8.2002 and inspection was thereafter carried out and according to the petitioner, the

respondent no.4 threatened to demolish the construction pursuant to his visit on 28.5.2003.

. The petitioner accordingly on 5.6.2003 filed Suit No.2446/2003 in the City Civil Court at Mumbai for declaring the notice under Section 53(1) of the MRTP Act as illegal and it was rejected on the ground of non jurisdiction. The appeal preferred against that order being A.O. No.386/2003 was disposed of. However, an interim protection was granted with a direction to the petitioner to take appropriate steps in accordance with law. The petitioner filed Writ Petition No.1518/2003 on 2.9.2003 before this Court. This Court while disposing of the writ petition directed the petitioner to approach the Competent Authority. The petitioner, accordingly filed a detailed representation before respondent no.4 which, according to the petitioner, was rejected without dealing with the contentions raised by the petitioner. The order of the Competent Authority dated 6.10.2003 was received by the petitioner only on 11.2.2004. That was challenged before this court by way of Writ Petition No.543/2004. The petition was dismissed with a direction to file appeal before the State Government within two weeks. The petitioner filed the appeal which was dismissed on 15.5.2006. The present petition challenges the said order.

4. We may first consider the contention of the petitioner that he had a deemed permission to carry on the construction. The relevant provision of the MRTP Act is Section 45. Under sub-section (5), if the Planning Authority does not communicate its decision whether to grant or refuse permission within sixty days from the date of receipt of the application or within sixty days from the date of receipt of reply in respect of any requisition made by the Planning Authority whichever is later, the permission shall be deemed to have been granted to the applicant on the date immediately following date of expiry of sixty days. What is however material is the proviso which sets out that such deemed permission is deemed to be granted provided the development proposal for which the permission was applied was strictly in conformity with the requirement of the relevant Development Control Regulations framed under the Act or bye-laws or regulations framed in this behalf under any law for the time being in force and the same in no way violates either the provision of any draft or final plan or proposal published by means of notice submitted for sanction under the Act. It is also provided that any development carried out in pursuance of such deemed permission which is in contravention of the provisions of the first proviso shall be deemed to be an unauthorised development for the purpose of Sections 52

to 57. In other words, it would be clear that the deemed permission is only in the event the application meets with the requirement of law. If the application does not meet with the requirement of law, then there can be no deemed permission.

5. We may now refer to some of the correspondence on record. There is no dispute that the petitioner while constructing ground plus three floors had consumed the necessary FSI and, therefore, for constructing 4th and 5th floor had to use additional FSI. The use of additional FSI can only be subject to the provisions of D.C.Regulation 64(b) of the 1991 Regulations. From the letter dated 24.9.2003 addressed by the petitioner to the Executive Engineer (Building Proposals) from para 7 it would be clear that The plan submitted for approval had deficiencies and these deficiencies required an exercise of discretion by the Municipal Commissioner under Regulation 64(b). In other words it was not in conformity with the Development Control Regulation as on 24.6.2000 and therefore the question of deemed permission will not apply. The deficiency in open space was approved by Deputy Chief Engineer on 10.8.2000. In other words, unless and until the deficiency was regularised, the application filed by the petitioner on 24.4.2000 was incomplete and consequently there is no question of a deemed permission. We have already

referred to the provisions of Section 45(5) and the proviso under MRTP Act. We are clearly therefore of the opinion that there was no deemed approval based on which the construction could have been put up as is contended by the petitioner.

6. With that we may now advert to the second contention as urged on behalf of the petitioners. In Appeal No.2180/2006 which was filed before the State Government in ground (d) the petitioner himself admits that Circle Officer was not allowing use of TDR in CRZ since 4.8.2000. As we have noted earlier, the recommendation of the Deputy Chief Engineer was on 10.8.2000. After 4.8.2000 there was a bar in using TDR in CRZ Zone. Can a mere recommendation and/or approval, if it can be considered to be so, authorise the petitioner the use of additional FSI by way of TDR on the plot in respect of which the FSI had been consumed? It is only considering D.C.Regulation 34 that additional FSI can be used provided it is permissible. In our opinion, the position is not only admitted by the petitioner but also his Architect as can be seen from Exhibit E to the petition, wherein it is set out that due to revised policy, though their client had purchased TDR and concession was approved, the approval for the utilisation of TDR could not be availed. A request was therefore made not to demolish the construction. The

learned Appellate Authority which considered the matter pursuant to the direction by this Court has noted all these facts and also that the stop work notice was issued to the petitioner on 23.8.2000. Inspite of that, the petitioner proceeded to put up construction. It would therefore be clear that the 4th and 5th floors have been constructed without the necessary permission under the provisions of the MRTP Act.

. The learned counsel had drawn our attention to the judgment in **Live Oak Resort (P) Ltd. & anr. vs. Panchgani Hill Station Municipal Council & anr., (2001) 8 SCC 329.** In that case, the appellant before the Supreme Court had constructed additional floor which was said to be in violation of Municipal Rules and directions issued by this Court in PIL being No.2754/1997. The Supreme Court noted from the order of this Court that what has been sanctioned was only the construction of ground plus one storey and basement. What was constructed however was a ground plus three storeys and that the so-called basement is actually the ground floor. It was urged before the Supreme Court that an additional floor was constructed in view of the no objection granted by the Director of Town Planning. Though technically there was no sanction from the Municipal Council keeping in mind that no objection was granted by the Director of Town Planning, the

construction of the extra floor by the petitioner should be regularised. This argument had not found favour with the High Court. It was urged, however, relying on Bye-law no.28.2, that once the Director of Town Planning had granted relaxation, the Council had no alternative but to sanction the same. For the reasons and other reasons set out therein, the appeal was allowed. The learned counsel points out that considering the judgment and in the instant case the approval had been granted for relaxation of deficiency in the open space, it must be deemed that there was deemed approval for the construction. In our case in view of the plot falling with CRZ II as from 4.8.2000 no TDR could be used on the plot.

. The petitioner has also relied on the judgement of the Supreme Court in **Hindustan Petroleum Corporation Ltd. vs. Darius Shapur Chenai & ors., (2005)7 SCC 641.** We fail to understand the purport of citing that judgment.

. The petitioner had come to this court in earlier rounds. He has preferred various appeals. The appeal pursuant to the direction of this Court has been dismissed. We find that order of the Appellate Authority does not suffer from any error of law apparent on the face of the record.

7. We are unable to agree with the contention as urged on behalf of the petitioner herein of deemed permission. As we have already noted the application was not complete in all respects and considering the proviso to Section 45(5), there could be no deemed permission. The petitioner was issued a stop work notice. The petitioner however has completed the construction inspite of that. In terms of D.C.Regulation 64(b) it is the Municipal Commissioner who has to exercise discretion to relax. In the instant case, the Deputy Chief Engineer had only put up a note and even assuming that the Deputy Chief Engineer can do so, that does not amount to an approval under the provisions of MRTP Act. Nothing is set out that the Dy.Chief Engineer had communicated the decision to the petitioner. Mere noting on its file for processing the file does not amount to permission. Even if we consider otherwise the construction cannot be regularised as it falls in CRZ II Zone and no TDR can be used. The petitioner had to have approval for the 4th and 5th floors which he does not have. It is not possible for this Court on the facts and circumstances, to grant any relief to the petitioner as clearly the construction of the 4th and 5th floors is by using additional FSI in the form of TDR in CRZ area

in which area there was a ban on use of TDR.

8. For the aforesaid reasons, rule is discharged. No costs.

. The learned counsel for the petitioner seeks stay of the order. Considering the facts and circumstances of the case, the order not to be given effect to for a period of eight weeks from today.

(F.I. REBELLO, J.)

(ANOOP V. MOHTA,J.)